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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1975

No. 75-6254

ARTHUR ETTEN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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BLEED THROUGH

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner Arthur Etten respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming the judgment of the Circuit Court of Cook County. The judgment of the Circuit Court of Cook County is not reported. The opinion of the Appellate Court is reported at 29 Ill. App. 3d 842 (1975). The opinion of the Appellate Court is included as Appendix A to this peti-

tion. The order of the Supreme Court of Illinois denying the petition for leave to appeal without opinion is not officially reported. The order from the Supreme Court of Illinois denying Leave to Appeal is included as Appendix B to this petition.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on June 13, 1975. A Petition for Leave to Appeal to the Supreme Court of Illinois was timely filed and denied on November 24, 1975. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the State's reliance on testimony that the non-testifying petitioner refused to make a statement to the police in face of accusation violated the defendant's Fifth and Sixth Amendment Rights.

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CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Fourteenth Amendment to the Constitution of the United States:

> ". . . Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

On December 9, 1971 late in the evening Arthur Etten, the defendant, and his mother were at their home in Oak Forest where she received a gunshot wound. (A. 197, 209) The Oak Forest Police proceeded to the home pursuant to a message received over their radio that someone had been shot. (R. 632) Upon their arrival the defendant and his mother told the investigating officer that she had been shot accidentally. (R. 635, 684) At trial the mother testified that she had been shot by the defendant in the left shoulder. (R. 683) Mrs. Etten was then taken by ambulance to the hospital accompanied by the defendant. (A. 198)

While his mother was being treated at the hospital the defendant left. (R. 637)

A few hours later, early in the morning of December 10, 1971, Mr. and Mrs. Raymond Quitter were awakened in their home in Oak Forest as the defendant was sneaking up the stairs with a gun. (R. 312, 339) He was dressed in Army camouflage clothing. (R. 330) The defendant forced Mr. Quitter into his bedroom at gunpoint. (R. 314) The defendant stated that he wanted the keys to the Quitter's car. (R. 314, 355) Mr. Etten then directed Mr. Quitter to pull out the phone wires and when Quitter was unable he did so himself (R. 316, 355, 377) striking Mr. Quitter with the butt of his gun afterwards. (R. 316, 334)

After leaving the Quitters' home the defendant directed the Quitters to drive him to his wife's house.

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Upon arrival at his wife's house the Quitters were led up the stairs and directed to ring the doorbell. (R. 323, 364) An old lady came to the window and asked who was there. The defendant replied that it was Art and some friends and told the old lady to let him in. (R. 324, 364) Another voice said "Oh my God, don't let him in. Call the police." (A. 159, 166) The defendant then pushed the Quitters aside and broke the windows in the door, shot through the door saying "get away from that phone." (R. 325, 365) The defendant entered the home and the Quitters fled on foot. (R. 325, 365)

The defendant then went up the stairs and shot Kathleen Etten, six times. (R. 442, 612-615) The defendant then left the home firing a shot through the doorway on his way out. (R. 442)

The defendant then fled in the Quitters' automobile and drove to 13160 Greenwood Street in Blue Island, Illinois. Later the home was surrounded by members of the Chicago, Oak Forest, and Blue Island Police Departments. (R. 528-541) After the defendant was forced from the premises by tear gas he was placed under arrest and placed in a Chicago Police Department squad car. (R. 560)

The defendant was then warned of his constitutional rights and he indicated that he understood them. (R. 69, 72, 79, 89, 102, 109, 561, 592)

After being warned of his rights the defendant asked Investigator Barrett "How is my mother," and Officer Barrett said she was in good condition; the defendant further stated "I know my wife is dead" and Investigator Barrett asked him how he knew and the defendant said "I don't have to tell you. You have informed me of my rights." (R. 73, 88, 102, 561, 593)

Petitioner was charged with the murder of Kathleen Etten by the Cook County, Illinois Grand Jury.

During a jury trial Officer Barrett testified as follows:

> Q. Now, after you advised him of these rights, was anything further stated?
> A. Yes.
> Q. Who was the first to speak, if you can recall?
> A. After his being advised of his rights, he was next to speak. (A. 195)
> Q. What, if anything, did he say?
> A. He said, "What's the condition of my mother?"
> Q. What, if anything, did you say?
> A. I told him that she was in good condition.
> Q. What, if anything, further was said?
> A. Well, he answered. The next thing he said—he said, "Well, I know my wife is dead."
> Q. Did you have occasion to say anything in response to this?
> A. Yes, I did. I asked him, "Well, how do you know your wife is dead?"
> Q. What, if anything, did Mr. Etten say?
> A. He said, "You told me my rights, you know, I don't care to say anything more." (R. 593, 594)

A motion to suppress these statements had been made prior to trial and was denied. (R. 67-110)

Later in the course of the trial the trial judge stated that in a normal trial his statement would not have been admissible but was allowing it in this case to show "State of Mind". (R. 674)

The defense presented was insanity and after hearing the evidence a verdict of guilty was returned and judgment entered on the verdict. The defendant was sentenced to 25-75 years in the Illinois State Penitentiary.

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On Appeal to the Appellate Court of Illinois petitioner argued that his statement relying on his Fifth and Sixth Amendment rights should not have been admitted.

The Appellate Court denied relief holding that there was a failure to object in the trial court and thus the error was waived. The Court also stated that even if the error was not waived the evidence was so overwhelming that the error could not be viewed as prejudicial.

A petition for leave to Appeal to the Illinois Supreme Court was denied on November 24, 1975.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT'S DECISION ALLOWING TESTIMONY THAT THE PETITIONER RELIED ON HIS CONSTITUTIONAL RIGHTS WAS NOT WAIVED NOR WAS IT HARMLESS ERROR AND SHOULD BE REVIEWED BY THIS COURT.

Petitioner contends that his Fifth and Fourteenth Amendment rights were violated by the prosecutor's use of testimony that the petitioner refused to make a statement to the police.

Shortly after his arrest and after being warned of his rights the defendant initiated a conversation with Chicago Police Investigator, Barrett. He asked the officer how his mother was and the officer said she was fine. He then stated that he knew his wife was dead and Officer Barrett asked petitioner how he knew this. Petitioner responded, "You told me my rights, you know, I don't care to say anything more." (R. 593, 594) A motion to suppress his statement was made and denied by the trial court. Subsequently this conversation was allowed into evidence during the State's case in chief.

Testimony during the prosecution's presentation of evidence that the petitioner, in response to a question by a police investigator, exercised his Fifth Amendment privilege ". . . in the face of accusation." requires a reversal. *Miranda v. Arizona*, 384 U.S. 436 (1966).

This court in *Miranda* made emphatically clear that testimony that a defendant who refused to make a statement and relied upon his rights when questioned by police violated defendant's Fifth and Sixth Amendment rights and deprived him of a fair trial. The Court said:

> "In accord with our decision today, it is impermissable to penalize an individual for exercising his Fifth Amendment privilege when he is under

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> police custodial interrogation. The prosecution may not, therefore, use at the trial the fact that he stood mute or claimed his privilege in the face of accusation." *Miranda v. Arizona*, 384 U.S. 436, 468, footnote 37 (1966)

Similarly in *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1797 (1965) this court has held that an accused's silence may not be commented on by the prosecution nor may a jury be instructed that such silence is evidence of guilt.

The statement of the petitioner here should not have been allowed to go before the jury. The fact that the defendant rested upon his constitutional rights and remained silent has no evidentiary value whatsoever. The trial judge himself as much as admitted the error when he stated that in a "normal" trial the statement would not be admitted but that he would admit it in this case to show state of mind. (R. 674) The only "state of mind" which a jury could infer from such a refusal to make a statement is a guilty state of mind. Particularly where the defense, as here, was insanity.

> "Too many, even those who should be better advised, view this privilege as a shelter for wrong doers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. *Grunewald v. U.S.*, 353 U.S. 391, 421; 1 L.Ed. 2d 931. (Citations Omitted).

The lower court's decision that the error was waived is untenable. A motion to suppress his statements was made before trial so that any error regarding his statement would be preserved. Secondly the court relied on the fact that the evidence was so overwhelming as to make the error harmless beyond a reasonable doubt. The defense presented at trial was insanity, therefore the evidence was uncontested and is necessarily "overwhelming".

The very fact of bringing to the jury's notice that Etten had claimed the Fifth Amendment, thereby arousing the jury's prejudice against him, was itself an infringement of the due process rights which govern the trial of any criminal case.

The decision of the lower court presents a conflict with the decisions of this court as enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966) and should be reviewed.

Furthermore, other relevant decisions of this Court (*Grunewald v. U.S.*, 353 U.S. 391 (1957), *Hale v. U.S.*, 17 Cr.L. 3094 (June 25, 1975) and *Griffin v. California*, 380 U.S. 609 (1965)) deal with the use of silence as impeachment and not whether reliance on constitutional rights can be used in the State's case in chief. Certiorari should be granted to answer this additional question.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District entered herein.

Respectfully submitted,

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APPENDIX A

Opinion Of The Appellate Court Of Illinois

MR. JUSTICE LORENZ delivered the opinion of the court:

Following a jury trial, defendant was convicted of the murder of his ex-wife in violation of section 9-1 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 9-1.) and was sentenced to a term of twenty-five to seventy-five years. On appeal, he contends that: (1) his right to examine prospective jurors was improperly restricted; (2) the State improperly relied upon testimony regarding his failure to make a statement; and (3) the State's arguments to the jury violated his rights.

Following the denial of various defense motions including motions to suppress evidence and identification, the matter proceeded to trial. The pertinent facts are not in dispute.

In the early morning hours of December 10, 1971, defendant broke into the home of Mr. and Mrs. Raymond Quitter and at gun point forced them to drive him to the home of his ex-wife, Kathleen Etten, who resided at 5830 S. Whipple in Chicago with their twelve year old son Brian and her mother, Mary Nolan. When they reached that address, defendant ordered Quitter to knock on the door. Mrs. Nolan answered the door and when defendant identified himself, she told him to leave. When defendant's wife awoke and was informed who was there, she said: "Oh my God, don't let him in, call the police." Defendant then shot open the door with his rifle and went upstairs. His ex-wife pleaded with him not to shoot her, but he shot her six times, killing her.

Defendant then fled. He was apprehended at 13160 Greenwood in Blue Island after tear gas was fired into that residence.

Although not one of the numerous prosecution witnesses thought defendant was mentally ill, defendant based his defense on grounds of insanity. He relied primarily upon the testimony of his mother, Katherine Etten, with whom he resided. In her opinion, defendant was mentally ill. She testified he had a difficult childhood and when his ex-wife would not permit him to visit his son, he began acting strangely and drinking heavily. On the evening of December 9, 1971, the same night defendant killed his ex-wife, she and her son were watching television. Suddenly, defendant, who was acting like a "zombie," stood up and said: "I feel like shooting somebody." She told him if he wanted to shoot somebody, he should shoot her. He then shot her in the left shoulder. She admitted telling the police she had shot herself accidentally, but said she did so to protect her son. No psychiatrist testified for defendant. However, on rebuttal, the State called Dr. Thomas Benton, a psychiatrist who had examined defendant. In Benton's opinion, defendant had the capacity to understand the criminality of his acts and to conform his conduct to the requirements of law. The jury found defendant guilty.

OPINION

Defendant contends that his right to examine prospective jurors was improperly restricted. Supreme Court Rule 234 (Ill. Rev. Stat. 1969, ch. 110A, par. 234.) provides:

> "The judge shall initiate the *voir dire* examination of jurors by identifying the parties and their respective counsel and briefly outlining the nature of the

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> case. The judge shall then put to the jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. *The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination,* but shall not directly or indirectly examine jurors concerning matters of law or instructions." (Emphasis added.)

This rule places primary responsibility for voir dire upon the trial judge. However, since the case of *Donovan v. People*, 139 Ill. 412, 414, 28 N.E. 964, 965, a defendant in Illinois has had the right to examine prospective jurors directly. Although the foundations of the *Donovan* case have been questioned (*People v. Lobb*, 17 Ill. 2d 287, 301, 161 N.E.2d 325, 333.), it appears that direct questioning of prospective jurors is not to be prohibited entirely. (*People v. Carruthers*, 18 Ill. App. 3d 255, 261-262, 309 N.E.2d 659, 664-665.) Illinois has not yet adopted the federal rule regarding voir dire. We do note, however, that under the Supreme Court Rule the defendant is entitled only to a "reasonable opportunity" to supplement the trial court's examination.

In the instant case, the trial court did not permit defendant to examine prospective jurors directly. The court required counsel to submit written questions which would be incorporated in the court's examination of the jurors. This procedure, although applied in the federal courts, was technically improper under prevailing Illinois law. However, such an error does not necessarily require reversal of a conviction, particularly where no prejudice is shown. (*People v. Carruthers*, 18 Ill. App. 3d 255, 309 N.E.2d 659.) Here, defense counsel did submit some questions to the court; but whether through misunderstanding or inadvertence, he did not submit other questions in accordance with the court's procedure. Moreover, the record does not reflect what

other questions defendant may have asked. Furthermore, we note that during voir dire, the court did modify its examination in response to defense comments and did grant defendant additional pre-emptory challenges when he so requested. Taking the voir dire examination in this case as a whole, we cannot say that defendant was in any way deprived of an impartial jury by the court's technically erroneous application of the federal rule regarding voir dire.

Defendant next contends that the State improperly relied upon testimony regarding his failure to make a statement. Defendant argues that the reference, by the police officers at trial, to his refusal to make further statements after being arrested and advised of his rights was reversible error pursuant to *Miranda v. Arizona*, 384 U.S. 436. While reference should not be made to a defendant's exercise of his right to remain silent, such an error may be waived by defendant's failure to object (*People v. Flowers*, 7 Ill. App. 3d 582, 587, 287 N.E. 2d 752, 756.) or may not justify reversal if it is harmless beyond a reasonable doubt. *People v. Brady*, 14 Ill. App. 3d 830, 303 N.E.2d 528; *People v. Garnes*, 12 Ill. App. 3d 210, 298 N.E.2d 399.

In the instant case, two police officers testified that after defendant was arrested and advised of his rights, defendant asked about his mother's condition. After being told that she was all right, defendant stated: "I know my wife is dead." When one of the officers asked how he knew that, defendant responded: "I don't have to tell you. You have informed me of my rights." However, defendant did not object to this testimony at trial and therefore has waived the error. Moreover, even if he had objected, the evidence against him was so overwhelming that the officers' references, when taken in context, cannot possibly be viewed as prejudicial.

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Defendant lastly contends that the State's arguments to the jury violated his rights. Defendant first argues that the State committed reversible error by commenting on his possible defenses. He suggests that such comments deprived him of a fair trial and improperly shifted the burden of proof to him. A prosecutor may not comment on defendant's failure to testify (*Griffin v. California*, 380 U.S. 609.) or argue that the burden is on defendant to prove himself innocent. (*People v. Weinstein*, 35 Ill. 2d 467, 220 N.E.2d 432.) However, a prosecutor is permitted to comment on evidence adduced at trial and may draw reasonable inferences from such evidence, even if those inferences are unfavorable to the defendant. *See People v. Kostos*, 21 Ill. 2d 496, 498-499, 173 N.E.2d 466, 468.

In the instant case, the assistant state's attorney discussed defenses defendant could have raised and pointed out that on the evidence in the case the only defense defendant had available was the defense of insanity. While defendant asserts that the State's argument had the effect of commenting on his failure to testify and of shifting the burden to him, we cannot agree. It was based upon the evidence presented and was not calculated to direct the jury's attention to defendant's failure to testify. This argument falls within the realm of fair comment.

Defendant next argues that the State committed reversible error during final arguments by accusing counsel of manufacturing an insanity defense. While the prosecutor is not permitted to appeal to the prejudices of the jury or to accuse defense counsel of seeking to free his client by trickery (*People v. Freedman*, 4 Ill. 2d 414, 123 N.E.2d 317.), he may comment on and draw inferences from the evidence.

Here, the assistant state's attorney, over defense objection, asked the jury to follow the law saying that if they did they would find defendant's insanity defense a "sham" which was "conjured up for sympathy" and to give him a "compromise" and asked them not to compromise. Although defendant asserts that these comments improperly aroused the prejudices of the jury and in no way aided the jury in weighing the evidence, the prosecutor's argument here was not an extended attack on either defendant or his counsel and was intended to discourage the jury from basing their judgment on sympathy rather than on the law. We find nothing improper about the State's argument in this regard.

Defendant next argues that the State should not have commented that defendant could be released from a mental institution within a short time. While discussing the testimony of defendant's mother, the prosecutor commented that her testimony may have been motivated by her belief that her son could be released from a mental institution in a short time. We note that defendant's mother had admitted not telling the police the truth in an effort to protect her son. Nonetheless, defense counsel objected to this argument and initiated a colloquy with the assistant State's attorney regarding the amount of time defendant could spend in such an institution. As a result, the court admonished the jury not to consider such argument or the comments of counsel and admonished counsel on both sides. Both the prosecutor and defense counsel apologized for their conduct. In the midst of a hard-fought trial, statements are sometimes made which are better left unsaid; however, such statements do not necessarily require reversal of a conviction. In the instant case we do not believe defendant was prejudiced by the State's final argument.

Defendant lastly argues that the prosecutor misrepresented the law of insanity during final argument

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by emphasizing that defendant knew what he was doing. Section 6-2(a) of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 6-2(a).) provides:

> "A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

While the assistant State's attorney did argue that defendant knew what he was doing (which may be a factor to consider in determining whether defendant appreciated the criminality of his conduct), he also pointed out that the court would instruct the jury regarding the law and stated, in language substantially the same as the statute, what he thought the instruction would be. Furthermore, we note that the trial court did instruct the jury on the law of insanity and that defendant has not complained that the instruction which the jury was given on the insanity issue was erroneous. In these circumstances, the State's statements were not reversible error.

Defendant also argues that the cumulative effect of the errors in the State's argument was prejudicial. Since we have already determined that none of the errors of which defendant complains require reversal, in order to examine the cumulative effect of these errors, we must look to the record as a whole. In doing so, we note that the evidence against defendant was overwhelming. Indeed, on the evidence in this case, no other result would have made sense. Defendant was not prejudiced by the State's arguments.

Therefore the judgment is affirmed.

Affirmed.

BARRETT, P.J. and SULLIVAN, J., concur.

APPENDIX B

Order Of The Supreme Court Of Illinois Denying Leave To Appeal

November 24, 1975

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, CLELL L. WOODS, *Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Witness Whereof, *I have hereunto subscribed my name and affixed the Seal of said court this 13th day of February, 1976.*

/s/ CLELL L. WOODS, *Clerk,*
Supreme Court of the State of Illinois.